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No. 6, Original

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

MEMORANDUM IN REGARD TO THE REPORT OF THE SPECIAL MASTER; MOTION FOR HEARING; AND BRIEF IN SUPPORT OF MOTION

INDEX

	Page
Memorandum in Regard to the Report of the Special Master	1
Motion for Hearing	5
Brief in Support of Motion	7
Statement	1
Discussion	11
I. The issues to be determined are justiciable in character	14
II. The legal principles underlying the three issues defined by the Special Master should be heard and determined by the Court on briefs and oral argument	20
A. Questions 1 and 2 (criteria for determining the base line of the marginal sea and the boundaries of the State's "inland waters").	23
B. Question 3 ("ordinary low-water mark")	30
III. The existence of historic exceptions to the application of the underlying principles for determining the limits of inland waters in the three oil-producing segments should now be heard and determined by the Court on briefs and oral argument	36
IV. No survey along the ground is necessary or desirable at this time	45
Conclusion	50

CITATIONS

Cases:

Anglo-Norwegian Fisheries Case, pending International Court of Justice	25
Antelope, The, 10 Wheat. 66	38
Borax Ltd. v. *Los Angeles*, 296 U. S. 10	31, 46
Brown v. *Piper*, 91 U. S. 37	25
Clark v. *United States*, 99 U. S. 493	38
Coffee v. *Groover*, 123 U. S. 1	38
Cuyler v. *Ferrill*, 1 Abb. (U.S.) 169, Fed. Case No. 3523, 6 Fed. Cas. 1088 (C.C.S.D. Ga.)	38
De Celis v. *United States*, 13 C. Cls. 117	38
Foster v. *Neilson*, 2 Pet. 253	17
Hilton v. *Guyot*, 159 U. S. 113	25
Hoyt v. *Russell*, 117 U. S. 401	38
Jones v. *United States*, 137 U. S. 202	17

Cases—Continued

	Page
Los Angeles, City of v. *Borax Consolidated Limited*, 5 F. Supp. 281, reversed, 74 F. 2d 901, affirmed, 296 U. S. 10	31
Ludecke v. *Watkins*, 335 U. S. 160	17
McGrath v. *Kristensen*, 340 U. S. 162	25
Moser v. *United States*, 341 U. S. 41	25
New Jersey v. *Delaware*, 291 U. S. 361	48, 49
Ocean Industries, Inc. v. *Superior Court*, 200 Cal. 235, 252 Pac. 722	38
Oetjen v. *Central Leather Co.*, 246 U. S. 297	17
Ohio Bell Tel. Co. v. *Commission*, 301 U. S. 292	38
Oklahoma v. *Texas, United States, Intervener*, 256 U. S. 70, 608; 260 U. S. 606; 261 U. S. 340; 265 U. S. 500, 505; 267 U. S. 452; 269 U. S. 314; 274 U. S. 714	19, 47, 48
Paquete Habana, The, 175 U. S. 677	25
Pearcy v. *Stranahan*, 205 U. S. 257	17
People v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941	38
Peru, Ex parte, 318 U. S. 578	17
Pope v. *United States*, 323 U. S. 1	17
Republic of Mexico v. *Hoffman*, 324 U. S. 30	17
Savorgnan v. *United States*, 338 U. S. 491	25
Scotia, The, 14 Wall. 170	25
United States v. *California*, 332 U. S. 19; 804; 334 U. S. 855; 337 U. S. 952	7, 8, 14, 15, 24, 25, 30, 33, 34, 39, 41
United States v. *Carrillo*, 13 F. Supp. 121	38
United States v. *Gypsum Co.*, 340 U. S. 76	22
United States v. *Louisiana*, 339 U. S. 699	25
United States v. *Pink*, 315 U. S. 203	17
United States v. *Texas*, 143 U. S. 621	18-19
United States v. *Texas*, 339 U. S. 707	25
Virginia v. *West Virginia*, 11 Wall. 39	19
Warren v. *United States*, 340 U. S. 523	25

State Statute:

Act of May 1, 1911, Cal. Stats. 1911, p. 1304	42

Miscellaneous:

Acts of the Conference, Vol. III, Territorial Waters (League of Nations Document No. C.315(b).M.145(b). 1930.V.), pp. 195-201	3
Bancroft's *History of California*	39
Boggs, S. W. Delimitation of Seaward Areas under National Jurisdiction, 45 A.J.I.L. (April 1951) 240, 249	25
California's *Citation of Documents*, pp. 327-330	39
California Ports and Harbors, California State Reconstruction and Reemployment Commission, Sacramento	29

Miscellaneous—Continued

	Page
Hearings before the Senate Committee on Interior and Insular Affairs, on S. J. Res. 20, 82d Cong., 1st sess.	43
H. Doc. 969, 60th Cong., 1st sess.	37
H. Doc. 267, 62d Cong., 2d sess.	37
H. Doc. 896, 63d Cong., 2d sess.	37
H. Doc. 1013, 66th Cong., 3d sess.	37
H. Doc. 349, 68th Cong., 1st sess.	37
H. Doc. 843, 76th Cong., 3d sess.	37
H. Ex. Doc. 191, 50th Cong., 1st sess.	37
H. Ex. Doc. 39, 52d Cong., 1st sess.	37
H. Ex. Doc. 41, 52d Cong., 2d sess.	37
Marmer, H. A., *Tidal Datum Planes* (United States Department of Commerce, Coast and Geodetic Survey, Special Publication No. 135, Washington, G. P. O. 1927)	30, 31, 32
Ports of Los Angeles and Long Beach California, The (War Department, Corps of Engineers, and U. S. Maritime Commission, Port Series No. 28, 1947)	37
Royal Decree of July 12, 1935 Norsk Lovtidende, 1935, 2 *nen Avdeling,* p. 618	25
Schureman, Paul, *Tide and Current Glossary* (United States Coast and Geodetic Survey, Special Publication No. 228, Rev. ed., 1949), p. 26	32, 33
S. Doc. 18, 55th Cong., 1st sess.	37
S. Doc. 130, 71st Cong., 2d sess.	37
The Twenty-eighth Year of the World Court, 44 A.J.I.L. (Jan. 1950), 21-22	26
The Twenty-Ninth Year of the World Court, 45 A.J.I.L. (Jan. 1951), 27	26
U. S. Coast Pilot, Atlantic Coast, Section C (Sandy Hook to Cape Henry), 5th (1947) ed., 107	48
9 Wigmore, *Evidence,* (3rd ed. 1940), sec. 2580	38

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 6, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

MEMORANDUM IN REGARD TO THE REPORT OF THE SPECIAL MASTER

In the Order of June 4, 1951, 341 U. S. 946 the Court called for briefs of the parties in relation to the Report of the Special Master filed May 22, 1951. This memorandum, together with the accompanying motion and brief, is submitted in response to that Order.

1. In the view of the United States, the Special Master's Report contains an adequate general summary of the issues now to be resolved, the positions and contentions of both parties in respect to those issues and the manner in which they should be resolved, and the nature and form of the evidence and materials proposed to be submitted by the parties under their respective theories of the

case. Subject to the comments set forth in the paragraphs to follow, the United States has no exception to make in respect to the contents of the Report of the Special Master.

2. In his discussion of Questions 1 and 2, which relate to the manner in which the landward limit of the marginal sea is to be determined along portions of the coast where there are offlying islands or where there are indentations of the coast, the Special Master observes that "neither party contends * * * that the criteria it now advances for answering Question 1 or Question 2 above have heretofore been definitively adopted by the United States or established as customary rules of international law" (Report, 1951, p. 8), and that it is "conceded that criteria now advanced by the parties have not heretofore been definitely adopted by the United States or established as existing rules of international law" (Report, 1951, p. 34). These statements reflect an apparent misunderstanding of the position of the United States in respect to this matter.[1] In a memorandum submitted August 12,

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[1] Neither the memorandum of August 12, 1949, nor any subsequent presentation of its position contains any statement suggesting that the United States makes or subscribes to the concession indicated by the Special Master. In a memorandum to the Special Master dated August 23, 1949, presenting its comments on the memorandum of the United States, California argued that the proposals of the American delegation at the 1930 Conference had no standing, either as representing principles of international law, or as a statement of the position of the Government of the United States. No response to this argument by California was made at that time, since it was felt that the contentions

1949, the United States advised the Special Master that, in its opinion, the answers to Questions 1 and 2 are to be found in the proposals of the delegation of the United States at the Conference for the Codification of International Law held at The Hague from March 13 to April 12, 1930.[2] It is the position of the United States that the principles proposed by it as solutions to Questions 1 and 2 have been adopted by the United States and are established rules of international law. At the appropriate time, we shall present to the Court the materials which support our position in this regard, including a statement from the Department of State.

3. The Special Master makes no recommendation as to the manner in which the issues defined by him should be heard and determined by the Court. It is the position of the United States that the underlying principles which will resolve these issues should now be determined by the Court itself, on briefs and after oral argument, without any prior hearings or oral testimony. It is also urged that the presence or absence of historic exceptions

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made by the State in this regard were argumentative in nature and related to matters which should be reserved for consideration when the issues are heard on the merits. Indeed, it was strongly urged to the Special Master, and he apparently agreed, that his report should merely state the issues and the positions of the parties in respect thereto, without elaborating on those positions by the inclusion of argumentative material which should more appropriately be presented to the Court in the briefs and oral arguments of the parties. Transcript of Proceedings before the Special Master, p. 258.

[2] The text of the American proposal is set forth in the Acts of the Conference, Vol. III, Territorial Waters (League of Nations Document No. C.315(b).M.145(b).1930.V.) pp. 195-201.

to the application of these general principles with respect to the three disputed areas now producing oil can be determined at the same time and by the same procedure. Pursuant to this position, the United States files herewith a Motion for Hearing and a Brief in Support of that motion.

4. The Report of the Special Master contains a notation of two points respectively insisted upon by the parties which the Special Master regards as outside of the directive of the Court's Order of June 27, 1949. One of these is California's contention that the questions involved in the determination of the boundary are purely legislative in character and beyond the power of this Court. The other is the continued insistence of the United States that the decision as to the status of the three segments of the coast described in its Petition for the Entry of a Supplemental Decree, filed January 29, 1948, should be given priority over the remaining four segments recommended by the Special Master in his Report of May 31, 1949. The views of the United States with respect to these two matters are set forth in the accompanying Brief in Support of Motion for Hearing, *infra,* pp. 14-20, 39-45.

Respectfully submitted.

J. HOWARD MCGRATH,
Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

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No. 6, ORIGINAL

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v.

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MOTION FOR HEARING

The United States, by its Attorney General and its Solicitor General, respectfully moves the Court for an order setting this cause for hearing by the Court, on briefs and oral argument, on the underlying principles which will resolve the three issues defined in the Report of the Special Master submitted May 22, 1951 (Report, pp. 1-2), namely:

a) By what criteria is the status of channels and other water areas between the mainland and offshore islands to be determined to be inland waters or open sea.

b) By what criteria is the status of coastal indentations to be determined to be bays, and therefore inland waters, or to be open sea.

c) By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained.

The United States further moves the Court that, as to issues numbered 1 and 2 in said Report of the Special Master, the Court also determine at the same time whether historic exceptions exist with respect to the application of these criteria to the waters abutting the three segments of the coast listed by the Special Master in Group 1 of the segments recommended for adjudication in his Report of May 31, 1949 (Report, 1949, pp. 1-2).

J. HOWARD MCGRATH,
Attorney General.
PHILIP B. PERLMAN,
Solicitor General.

In the Supreme Court of the United States

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No. 6, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

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BRIEF IN SUPPORT OF MOTION

STATEMENT

This cause was instituted on October 19, 1945, for the purpose of obtaining an adjudication of the rights of the United States in the lands and mineral resources underlying the three-mile belt of the Pacific Ocean adjacent to California, seaward of the ordinary low-water mark along the open coast and outside of the inland waters.

In the decision rendered by this Court on June 23, 1947 (332 U. S. 19), and in the decree entered October 27, 1947 (332 U. S. 804, 805), the United States was granted the relief sought, but both the decision and the decree were general in terms and application and in neither was there a precise definition of the area involved in the controversy,

this matter being reserved for subsequent determination by the Court in the event that such precise definition should become necessary. See 332 U. S. 19 at 26, 805.

On January 29, 1948, the United States filed its Petition for the Entry of a Supplemental Decree in which the Court was requested to determine with greater definiteness the boundary between the three-mile belt of the Pacific Ocean and the inland waters of California along three segments of the California coast. The segments chosen were those embracing all areas within which actual production of petroleum from tide and submerged lands was then, and is presently, known to be taking place. California replied to this petition with a request that the boundary be determined along the entire coast of California, from Oregon to Mexico. On June 21, 1948, this Court entered an order denying California's petition for an ascertainment of the entire coastal boundary, stating that it was in doubt at that time as to what particular segments of the boundary, if any, required determination, and directing that a master be appointed to recommend to the Court what particular portions of the boundary call for precise determination and adjudication and, in the event that such adjudications should be made, to recommend an appropriate procedure to be followed in determining the boundary 334 U. S. 855.

The Special Master appointed by the Chief Jus-

tice filed his Report on May 31, 1949, recommending that precise determination and adjudication of the boundary be made along seven segments of the California coast, these segments being the three urged by the United States in its Petition for the Entry of a Supplemental Decree and four additional segments selected from those requested by California. In the 1949 Report, the Special Master also defined three questions which, in his opinion, must be determined by judgment of the Court before any survey of the boundary can be undertaken, namely:

> (a) By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained;
>
> (b) Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers and other inland waters to be drawn;
>
> (c) What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined. [Report, 1949, pp. 3-4.] [3]

The Special Master further recommended that a master be appointed to conduct proceedings in the

[3] These are the same three issues set forth in the Special Master's 1951 Report at pages 1 and 2, and referred to below, but the order of their statement is reversed.

nature of a pre-trial conference and report thereon to the Court.

In Orders entered June 27, 1949, the Special Master's report was received and ordered filed, and his appointment was continued with the direction that he proceed with all convenient speed, with respect to the seven segments of the coast recommended by him, to consider: "(1) a simplification of the issues; (2) statements of the issues and amendments thereto in the nature of pleadings; (3) the nature and form of evidence proposed to be submitted, including admission of facts and of documents which will avoid unnecessary proof; and report thereon to the Court." 337 U. S. 952. The Report of the Special Master in compliance with this reference was filed with the Court on May 22, 1951.

As stated in the Memorandum in Regard to the Report of the Special Master (*supra,* pp. 1-2), we believe that the Special Master has correctly set forth the three issues to be adjudicated at this stage of the proceedings (Report, 1951, pp. 1-2) and has correctly summarized the positions and contentions of the two parties with respect to the answers to those issues and to the procedure by which the issues should be resolved. (Report, 1951, pp. 3-36). The Report also summarizes the evidence and materials which California desires to introduce in support of its position (Report, 1951, pp. 10-34), and points out that, in the view

of the United States, California's proposed evidence and testimony are wholly irrelevant and unnecessary (except for some historical materials) if the proper criteria for determining the boundary between the state and federal areas are adopted. The Special Master has not, however, made any recommendation to the Court as to the procedure by which the issues outlined by him should be adjudicated. Nor has he made a definitive recommendation as to which of the seven segments should be considered first.

DISCUSSION

In the view of the United States, the appropriate procedure is for the Court to order a hearing, on briefs and oral argument, on the underlying legal principles to be used in resolving the three questions stated by the Special Master. These fundamental issues which the Court should now hear and determine are:

(a) By what criteria is the status of channels and other water areas between the mainland and offshore islands to be determined to be inland waters or open sea.

(b) By what criteria is the status of coastal indentations to be determined to be bays, and therefore inland waters, or open sea.

(c) By what criteria is "the ordinary low-water mark on the Coast of California" to be ascertained.

By this procedure the following significant results will be accomplished in the shortest possible

time and further delay will be avoided in this already too long-drawn-out litigation: (A) The Court will be enabled to choose, as a matter of law, between the conflicting principles espoused by the United States and California for determining the "boundary" between the federal and state areas, and to establish general legal criteria to govern such determinations in this and the other submerged lands suits; whichever set of criteria is adopted, the choice between them is plainly a pure matter of law for the Court. (B) If the Court should accept the criteria advanced by the United States, all of the non-historical and much of the historical material proffered by California would be stamped as irrelevant and unnecessary, and no time would be wasted in its presentation; the Court would be in a position, by applying the Government's criteria which do not require evidence or testimony, immediately to pass upon the status of the large outer water areas claimed by the State and simultaneously to adjudicate the three oil-producing segments. (C) If, on the other hand, the Court should accept in full, as a matter of law, California's rock-to-rock and island-to-island principle for determining the coastline it would thereby determine that all the water areas landward of the off-shore islands are inland, and thus end the present controversy so far as the oil-producing segments are concerned; or, if the Court should reject the island-to-island principle but accept Cali-

fornia's criteria for ascertaining the status of bays, the way would be cleared for a determination of the particular segments on the basis of the materials relevant to those criteria. (D) Finally, even if the Court should fail to adopt the whole of the general criteria advanced by either California or the United States, it might, at least, establish some legal principles which would guide the parties in selecting materials relevant to the ultimate delimitation of the specific areas in issue.

As a second step, which can and should be taken at the same time as the determination of the underlying legal issues, the Court should order a hearing, on briefs and oral argument, on whether there are historic exceptions to the application of whatever general criteria are chosen, with respect to the three segments listed by the Special Master in Group 1 of the segments recommended for adjudication in his Report of May 31, 1949. Both parties agree that, whatever the other legal criteria, waters may be required to be treated as inland because historically they have been so considered. Therefore, if any particular area has in fact been considered inland throughout its history there is no need, as to such area, of considering other criteria. Since both parties are agreed on this principle, it is appropriate that the historical materials be referred to the Court and a determination of the existence or non-existence of historical exceptions made immediately. It is urged that this issue be determined first as to the three segments listed by

the Special Master as Group 1 because these are the only areas where petroleum is being produced, making a speedy determination as to them particularly desirable. If California prevails in its claim of historical exceptions, the controversy will end at once. If it fails, application of the general criteria which the Court announces will, in all probability, likewise result in a quick conclusion.

In this brief, we shall endeavor to show that the procedure we urge is the most practicable and appropriate, and the least time-consuming. It is squarely based upon, and will lead to, the "simplification of the issues" envisaged by the Court's Order of June 27, 1949. 337 U. S. 952. Any further reference to a Master at this stage will lead, on the other hand, only to greater and, we believe, unnecessary delay.

I

The Issues to Be Determined Are Justiciable in Character

The Special Master, at the outset of his Report, notes that the State of California opposes the determination by judicial decree of any of the boundary lines under consideration and insists that the questions involved in such determination "are purely legislative in character beyond the power of this Court." Report, 1951, page 2. Since this contention by California is an attack upon the jurisdiction of this Court to make the adjudications required in these supplementary proceedings, this matter will be dealt with prior to a detailed presentation of

our views as to the method by which such adjudications should be made.

An answer to California's suggestion that this Court is without power to make an adjudication with respect to the boundary lines here involved has already been given by the Court in the main opinion in this case. The opinion of the Court contains the following statement (332 U. S. 19, 26):

> We may assume that location of the exact coastal line will involve many complexities and difficulties. But that does not make this any the less a justiciable controversy. Certainly demarcation of the boundary is not an impossibility. Despite difficulties this Court has previously adjudicated controversies concerning submerged land boundaries. See *New Jersey* v. *Delaware,* 291 U. S. 361, 295 U. S. 694; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 21-27; *Oklahoma* v. *Texas,* 256 U. S. 70, 602. And there is no reason why, after determining in general who owns the three-mile belt here involved, the Court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary. *Oklahoma* v. *Texas,* 258 U. S. 574, 582. Such practice is commonplace in actions similar to this which are in the nature of equitable proceedings. See *e.g. Oklahoma* v. *Texas,* 256 U. S. 602, 608-609; 260 U. S. 606, 625, 261 U. S. 340.

From these observations it is clear that the Court envisaged the possibility of boundary determina-

tions such as these now before it and was of the opinion that it has jurisdiction to make such determinations. This, we believe, is the law of the case.

California urges, however, that the ascertainment of the points at which inland waters end and the open sea begins will necessitate determinations as to the location of the exterior, as well as the landward, limits of the marginal sea and will thus involve questions of national policy to be decided by the political branch of the Government and not by a judicial tribunal. It is our view that national policy with respect to territorial waters has already been established by the executive branch of the Government and that the only question before the Court is the effect of that existing national policy on the dispute between the United States and California.[4]

Even if, as we believe, the views of the Executive as to the proper method, under international law, for measuring a country's marginal sea and the outer limits of its inland waters should have great, if not conclusive, weight in this proceeding, it does not follow that the controversy is rendered nonjusticiable and the Court powerless to enter a specific decree based upon the general principles announced by the political branch. Courts have

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[4] We propose, in connection with the hearing on the merits, to present a statement from the Department of State setting forth the views of the United States, in its relations with foreign countries, on the proper criteria for the delimitation of a country's territorial waters and the exterior boundaries of its inland waters.

long accepted and acted upon an executive decision as to the nation which is sovereign over a particular piece of territory. *Jones* v. *United States,* 137 U. S. 202, 212; *Foster* v. *Neilson,* 2 Pet. 253, 307-9; *Pearcy* v. *Stranahan,* 205 U. S. 257, 265. The government recognized by the President as representative of a foreign state will be accepted without question (*Oetjen* v. *Central Leather Co.,* 246 U. S. 297), as will the "underlying policy" which governs the question of recognition by the United States (*United States* v. *Pink,* 315 U. S. 203, 229). A certification by the State Department that a foreign vessel, sued in our courts, is state-owned and immune from seizure is sufficient foundation for a judgment by our courts. *Ex parte Peru,* 318 U. S. 578, 588-590; *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 34-6. The termination of a state of war is likewise a political decision which is accepted and utilized by the judiciary. *Ludecke* v. *Watkins,* 335 U. S. 160, 166-170. As these examples show, a court is not ousted of jurisdiction to decide a particular case between adverse parties by virtue of the fact that its decision may have to rest, in whole or in part, upon a political act or determination. See also *Pope* v. *United States,* 323 U. S. 1, 10-14.

In any event, this case is, in its present posture, primarily a boundary dispute between the United States and one of its component States, requiring the ascertainment of the line separating the areas

within which certain rights and powers of the respective governments may be exercised.

It has long been held that controversies of this character are justiciable in nature and are within the jurisdiction of this Court. Thus, in *United States* v. *Texas,* 143 U. S. 621, this Court held that it had original jurisdiction of a suit brought by the United States against Texas to determine the boundary between Texas and the Indian Territory, although one of the grounds set forth in the State's demurrer to the complaint was that the question presented was "political in its nature and character, and not susceptible of judicial determination by this court." 143 U. S. at 631. In support thereof, Texas argued [5] that the adjudication of the case would require a consideration of the boundary provisions contained in the Treaty of 1819 between the United States and Spain, that of 1832 between the United States and Mexico and that of 1838 between the United States and the Republic of Texas, and would thus, in effect, involve a question "respecting the boundaries of nations," which, Texas contended, is "more a political than a legal question." 143 U. S. at 625. In response to this argument, this Court found that its jurisdiction to resolve a boundary dispute between the United States and a State is similar to that under which it may adjudicate such a dispute between two States and

[5] The argument of counsel for Texas on this point is summarized at 143 U. S. at 624-625.

noted, by way of quotation from an earlier decision,[6] that "this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." 143 U. S. at 640.

The case of *United States* v. *Texas, supra,* was the beginning of the prolonged Red River boundary controversy which was later before this Court in the case of *Oklahoma* v. *Texas, United States, Intervener,* 256 U. S. 70, 608; 260 U. S. 606; 261 U. S. 340; 265 U. S. 500; 274 U. S. 714. The dispute as to the boundary there involved, determined to be "along the south bank" of the Red River (256 U. S. 70, 93), was in many respects similar to the dispute before the Court in the present case,[7] which, notwithstanding its possible implications with respect to political and external matters, is nonetheless a dispute between the United States and a State, subject to the jurisdiction of this Court.

In view of these considerations, it is clear, we

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[6] *Virginia* v. *West Virginia,* 11 Wall. 39, 55.

[7] There were numerous producing oil wells in both the upland area south of the boundary, which was held to belong to the grantees of Texas, and in the "river-bed area" north of the boundary, which was the property of the United States. See 265 U. S. 505, 508.

think, that the boundary determinations involved in these proceedings are justiciable in character.

II

The Legal Principles Underlying the Three Issues Defined by the Special Master Should Be Heard and Determined by the Court on Briefs and Oral Argument

The decision to be made by the Court at the present stage of this litigation involves the selection of the procedure by which the three questions set forth in the Reports of the Special Master (Report, 1949, pp. 3-4; 1951, pp. 1-2) are to be heard and determined. These three questions, as the Special Master concluded, must be determined "by judgment of the Court" before any necessary survey or more precise determination of any portion of the boundary between the areas subject to the respective rights of the parties can be undertaken. When the general principles underlying these questions are decided, however, the Court will have provided criteria which will permit the actual location of the boundary, if and when such location may be required. These criteria, when established, may also make any subsequent, more exact, determination unnecessary. See Report, 1949, p. 3. The general principles underlying the three questions to be adjudicated, as outlined by the Special Master, relate to (1) the criteria for determining the status, as open sea or inland waters, of so-called channel areas between the main-

land and offshore islands, (2) the criteria for determining the status and delimitation of particular water areas where there are curves in or indentations of the coast line, and (3) the formula by which the "ordinary low-water mark" is to be ascertained.

Since these three general issues are essentially legal in nature, they can be heard and determined by the Court on briefs and oral arguments on the basis of matters and materials subject to judicial notice and without the necessity of any prior hearings. If the principles urged by the United States for determination of the "boundary" are accepted by the Court, there will be eliminated any necessity of considering the great mass of materials which California urges must be considered. All of the opinion and "expert" scientific testimony and data on use and occupancy will be irrelevant and the only subsidiary issue to be decided will be the existence of historic exceptions to the application of the principles adopted. As pointed out below, *infra,* pp. 36-39, we urge that the presence or absence of historic exceptions with respect to the oil-producing areas be determined simultaneously with the legal principles in order that this case may be most expeditiously concluded.

If, however, the principles urged by California for determining the "boundary" be accepted, then the way will be cleared for a subsequent determination of particular segments by the Court on the

basis of material relevant to the application of those principles to the areas in question.

California appears to contend, however, that the next step in the proceeding should be a prolonged hearing at which the State desires to introduce the oral testimony of numerous witnesses, some of them appearing as "opinion" witnesses and others as witnesses purporting to testify in regard to factual matters of local significance (Report, 1951, pp. 10-29). But such detailed oral testimony is wholly unnecessary, in our view, to an adjudication of the questions which should be determined, and hearings of the type desired by California would serve only as a further postponement of the ultimate termination of this already prolonged litigation. Like a demurrer, motion to dismiss, or motion for judgment on the pleadings, a court hearing of the type we urge may very well render unnecessary a long, detailed, and burdensome trial of facts which will prove to be irrelevant. Cf. *United States* v. *Gypsum Co.*, 340 U. S. 76, 81, 85, *et seq.*[8]

In presenting our reasons for urging that the Court itself should now hear and determine the

[8] In that case, the Court approved the district court's action in granting summary judgment where the defendants' proffers of evidence were irrelevant or not pertinent under the controlling legal theory of the case. The Court pointed out that the defendants had the right to introduce relevant evidence; but "Such rights, however, did not require the trial court to admit evidence that would not affect the outcome of the proceedings. They did not affect the power of the trial court to direct the progress of the case in such a way as to avoid a waste of time." (340 U. S. at 85.)

underlying legal issues, without any prior hearings or testimony, we shall, as did the Special Master (Report, 1951, pp. 8-9), group Questions 1 and 2 together for the purposes of discussing the manner in which those questions may be decided. Question 3 will be treated separately.

A. *Questions 1 and 2 (criteria for determining the base line of the marginal sea and the boundaries of the State's "inland waters").*

The basic problem which gives rise to Questions 1 and 2 is the necessity for determining, as a matter of general principle, the manner in which the landward limit of the three-mile belt of the Pacific Ocean is to be measured along the coast of California. The decision of Question 1 will depend upon whether the belt is to be measured along the mainland of California, following the sinuosities of the coast (except where true bays, rivers, and other inland waters enter the ocean), or whether it is to be measured from and outside of straight lines artificially drawn from salient points on the coast to and around the outer edges of rocks and other islands situated offshore, some of them being more than 50 miles from the mainland. With respect to Question 2, criteria must be adopted for determining what indentations of the coast are to be treated as bays consisting of inland waters so that the three-mile belt is to be measured from straight lines drawn across the mouths of such

indentations rather than along the mainland within the indentations.[9]

1. It is the view of the United States, as the statement of its contentions makes clear (Report, 1951, pp. 4, 5-7, 8-10, 28-29, 34-35), that the choice between the conflicting criteria offered in answer to Questions 1 and 2 directly depends upon developments in the field of international law as well as the position of the United States in respect to such developments, as reflected by its participation in international conferences and its dealings with other nations. These developments will establish, as we intend to show when the issues are heard on the merits, that there are certain basic rules which apply to the measurement of the marginal sea along the shores of this or any other nation.

Developments in the field of international law and actions of the Government of the United States in respect thereto are all matters which can be brought to the attention of the Court by references to documentary materials subject to judicial notice. The problem is not one involving a conflict in factual claims which must be resolved by the taking of evidence. It concerns rather the presentation by the parties of various authorities and materials which, as the Special

[9] One method of statement is that the general principles for answering Questions 1 and 2 involve a more detailed definition of the terms "coast of California" and "inland waters," as they are used in paragraph 1 of the decree of October 27, 1947. 332 U. S. 805.

Master observes, "relate to occurrences in the field of international law of a character to which reference could and would be made by court or counsel engaged in research in that field * * *." Report, 1951, p. 13. As in *United States* v. *California,* 332 U. S. 19; *United States* v. *Louisiana,* 339 U. S. 699; and *United States* v. *Texas,* 339 U. S. 707, all the pertinent international law materials can and should be presented in briefs or supplemental memoranda.[10] This is the suggestion which the Special Master seems to put forward (Report 1951, p. 14).

2. In connection with its consideration of this question, the Court should be advised of the *Anglo-Norwegian Fisheries Case,* now pending before the International Court of Justice. That proceeding, which was instituted by the United Kingdom on September 28, 1949, involves a challenge to the validity of certain point-to-point lines established by Norway along its coast as base-lines for the delimitation of the marginal sea and the control of fishing activities therein.[11] For the pur-

[10] Other recent cases in which similar materials have been presented in this manner are *Moser* v. *United States,* 341 U. S. 41, *Warren* v. *United States,* 340 U. S. 523, *McGrath* v. *Kristensen,* 340 U. S. 162, and *Savorgnan* v. *United States,* 338 U. S. 491.

See also *The Paquete Habana,* 175 U. S. 677, 700, 708; *Hilton* v. *Guyot,* 159 U. S. 113, 163; *Brown* v. *Piper,* 91 U. S. 37, 42; *The Scotia,* 14 Wall. 170, 188.

[11] Royal Decree of July 12, 1935. Norsk Lovtidende, 1935, 2*nen* Avdeling, p. 618. A portion of the base-line described in this decree is depicted in Figure 1 accompanying the article by Boggs, S. W., *Delimitation of Seaward Areas under National Jurisdiction,* 45 A.J.I.L. (April 1951) 240, 249.

poses of the dispute, the United Kingdom has conceded Norway's claim to a marginal sea four miles in width for the enforcement of fisheries regulations, but has insisted that such a zone may be measured only from base-lines "drawn in accordance with the principles of international law" and has taken the position that the base-lines prescribed by Norway (which resemble those claimed by California) are in violation of international law. The United Kingdom has asked the International Court of Justice to declare the principles of international law to be applied in defining base-lines along the Norwegian coast, to define the base-lines insofar as may be necessary, and to award damages for Norwegian interferences with British fishing vessels outside of the zone Norway is entitled, under international law, to reserve for its nationals. See *The Twenty-eighth Year of the World Court,* 44 A. J. I. L. (Jan. 1950), 21-22. Time limits for the submission of the United Kingdom memorial, the Norwegian counter-memorial, the United Kingdom reply and the Norwegian rejoinder were fixed by an Order of November 9, 1949. Following certain extensions, the time limits for the reply and rejoinder were scheduled to expire early in 1951. See also *The Twenty-ninth Year of the World Court,* 45 A. J. I. L. (Jan. 1951), 27. Oral argument was expected during the present calendar year and, it is understood a decision in

the case may be forthcoming near the close of the year.

The importance of the Anglo-Norwegian litigation in relation to this cause lies in the fact that it places before the International Court a controversy which is in many respects similar to that involved at the present stage of these proceedings, particularly insofar as it will require a delimitation of the marginal sea along a coastline where there are numerous indentations as well as offlying rocks and islands. Of great significance, we think, is the contention of the United Kingdom that Norway may not unilaterally prescribe the base-lines of its marginal sea. This is, in effect, what California proposes be done in this case (Report, 1951, p. 10). It is also noteworthy, in connection with California's demand for oral testimony on the principles of international law, that these important questions are being heard by the International Court of Justice on the briefs (memorial, counter-memorial, reply and rejoinder) and oral arguments of the parties, without the necessity of any prior hearing or the taking of any testimony.

3. If the criteria advanced by the United States for fixing the landward limits of the marginal sea are adopted, the only additional information which the Court will require to reach a final adjudication on the status of the water areas in dispute is whether or not there are historical exceptions to the application of those criteria. The other evi-

dence—geological, hydrographic, commercial, topographic, "opinion"—proffered by California (summarized in the 1951 Report at pages 17-28) is irrelevant both to the determination of the proper legal principles to be followed and to the application of the principles advocated by the United States to the disputed segments.

Only if the general criteria advanced by California are adopted would its proposed "evidence" be relevant and, even in that event, the information it desires to submit could readily and appropriately be presented in written form, as the Special Master intimates. (Report, 1951, pp. 35-36). This is true, we submit, of the proposed testimony relative to geology and oceanography desired from Dr. F. P. Shepard and U. S. Grant IV, that relating to physical and geographical features of the costline and developments along the coast, which would be presented through Gerald C. Fitzgerald and other engineers specializing in harbor and shoreline development, and that relating to shipping and sailing conditions, commercial activity and other matters essentially local in significance which would be the subject of testimony by yachtsmen, small boat operators, local officials and numerous other residents of various communities along the segments under consideration. Assuming that such matters are relevant (which would only be true if the United States' criteria were rejected), they need not be proved by oral testimony. Any pertinent facts

with respect to geology and oceanography may be presented to the Court by reference to scientific works and publications, while statistics relating to shoreline topography, distances between headlands and between the mainland and offshore islands, weather conditions, wave and current direction and intensity, wind direction, exposure to storms, harbor installations and related matters are all available in various documentary materials of unquestioned authenticity. Examples of such materials are the charts, Coast Pilots and other publications of the Coast and Geodetic Survey; Rivers and Harbors Reports, Beach Erosion Board studies, Port Series reports and Annual Reports of the Chief of Engineers, all prepared by or for the Office of Engineers, Department of the Army; various charts and publications of the Hydrographic Office, Department of the Navy; reports of the Weather Bureau and various other official publications of both the Federal Government and the State of California.[12] The information available in such materials is, we think, more than adequate to advise the Court as to the facts essential to a decision of the issues involved, even if our basic theory of the proper criteria is not accepted.

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[12] An example of a publication of the State containing valuable statistical information with respect to all of the segments of the coast under consideration is *California Ports and Harbors*, published by the California State Reconstruction and Reemployment Commission, Sacramento.

B. *Question 3 ("ordinary low-water mark")*

The third question defined by the Special Master relates to the criteria by which "the ordinary low-water mark" is to be ascertained.[13] The decision of this question by the Court will provide a formula which may be applied by engineers along any portion of the open coast of California where precise location of the ordinary low-water mark may be necessary.

As the Special Master indicates (Report, 1951, p. 32), the United States regards Question 3 as essentially a question of law which may be decided by the Court itself on the basis of facts not open to dispute. The problem is chiefly that of giving the Court's approval to the appropriate scientific and engineering processes by which the necessary ascertainment of the ordinary, or mean, low-water mark may be made. In the view of the United States, the authoritative and controlling engineering procedure is that set forth in Special Publication No. 135 of the United States Coast and Geodetic Survey.[14] Indeed, this Court has heretofore relied on this publication in connection with its approval of the similar procedure required for the ascertainment of the "ordinary high-water mark"

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[13] The question really involves an expanded definition of the term "ordinary low-water mark" as used in the decree of October 27, 1947. 332 U. S. 805.

[14] The full title of this publication is Marmer, H. A., *Tidal Datum Planes* (United States Department of Commerce, Coast and Geodetic Survey, Special Publication No. 135, Washington, G. P. O., 1927).

along the coast of California. *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 21-27. Special Publication No. 135 deals with the principles and techniques involved in the determination of the various tidal datum planes, such as mean sea level, mean high water, mean low water, mean lower low water, mean higher high water and other planes of reference utilized from time to time for various scientific, technical and practical purposes.

A significant point to be kept in mind when considering this Court's decision in the *Borax* case is the fact that the selection of the appropriate formula for ascertaining ordinary high-water mark was made by the court below and affirmed by this Court in a proceeding which involved the taking of no evidence at all. The case, instituted by the City of Los Angeles as a suit to quiet title, involved a dispute as to the boundary between certain uplands on Mormon Island, held by the Borax company under a patent from the United States, and adjacent tidelands belonging to the City under a grant from the State of California. In the district court the case was heard on a motion of the defendant company to dismiss the complaint filed by the City, and the complaint was dismissed on the ground that a determination as to the limits of the Federal grant, made by the Land Department in connection with the issuance of a patent to the upland, could not be inquired into in a collateral proceeding. *City of Los Angeles* v. *Borax Con-*

solidated Limited, 5 F. Supp. 281, 282 (S. D. Cal.). The Circuit Court of Appeals reversed this ruling, holding that the question as to the location of the ordinary high-water mark, marking the boundary between the properties, was one for judicial determination. The Court of Appeals, considering the matter without any "evidence" in the record, proceeded to define the meaning of "ordinary high-water mark," relying on various authorities and treatises, and particularly on Special Publication No. 135 of the United States Coast and Geodetic Survey. 74 F. 2d 901, 904-906 (C.A. 9). In its opinion affirming the action of the Circuit Court of Appeals, this Court also considered and relied upon the same Special Publication No. 135. 296 U. S. 10, 21-27. It is the position of the United States in the present case that Special Publication No. 135 and other materials published by the Coast and Geodetic Survey should be given equal effect in the ascertainment of the meaning of the cognate term "ordinary low-water mark" [15] and that this Court may make such ascertainment by consulting these and similar materials without the necessity of a hearing at which oral testimony would be introduced.

As is stated in the report of the Special Master (Report, 1951, p. 30), California does not question

[15] "Mean high water" is discussed at pages 74-97 of Special Publication No. 135; "mean low water" is discussed at pages 97-108. The word "ordinary", when applied to tides, is the equivalent of the word "mean". Schureman, Paul, *Tide and Current Glossary* (United States Coast and Geodetic Survey, Special Publication No. 228, Rev. ed., 1949), p. 26.

the technical procedures established by the United States Coast and Geodetic Survey,[16] but it does argue that "ordinary low water", as used in the Court's decree of October 27, 1947, is the mean of all the *lower low waters*[17] rather than the mean of all the low waters. In support of its position, California seeks to call as a witness one of its State officials, who would testify as to the practice followed by various agencies of the United States Government with respect to the datum plane employed along the coast of California. Such testimony, we think, is quite unnecessary and inappropriate. In so far as the practices of the various agencies engaged in activities relating to this problem are relevant, they may be submitted to the Court without resorting to oral testimony. Indeed, as the Special Master suggests (Report, 1951, pp. 33-34), the practice of these Departments could be correctly ascertained by direct reference to official publications or by calling on the appropriate departments for the desired information.

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[16] These procedures provide the criteria for determining the level, or plane, of "ordinary low-water." Following this determination, the ascertainment of the "ordinary low-water mark"—the line at which the plane of ordinary low-water intersects the shore—is an engineering process which may be performed by the Coast and Geodetic Survey or some similarly qualified organization.

[17] The tides along the Pacific coast are of the mixed type, there being two high and two low waters—reaching different levels of high water and different levels of low water—during the course of each tidal day. One of the low waters is referred to as *higher low water* and the other as *lower low water*. Schureman, *supra*, pp. 17, 21.

Additional legal problems which may require solution by the Court in connection with Question 3 are those arising as the result of either artificial changes in the shore line or natural accretions to artificial structures.[18] In such instances, it may ultimately be necessary to ascertain the location of the boundary as of the date such changes occurred, but there is no need at this time for such a precise survey. At the present stage of these proceedings, the problem is the establishment of general rules by which these questions may, if necessary, be determined. It goes without saying that questions as to the effect of artificial changes in the boundary are purely questions of law.

In view of these considerations, it is submitted that Question 3 is one which may now be heard and decided by the Court, without prior hearings or oral testimony.

In short, we propose what we believe to be a true "simplification of the issues" (337 U. S. 952). We ask the Court to hear and determine general issues of law which may dispose of the whole controversy,

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[18] The parties agree that the applicable law with respect to riparian boundaries requires that natural changes in the shore line, resulting from gradual, imperceptible accretions or erosions, should be ignored. Consequently, the boundary shifts with natural changes in the shore line, and the ordinary low-water mark to be ascertained, where there are no artificial changes in the shore, is that existing on the date a survey may be necessary.

or substantial parts of it, thereby avoiding unnecessary trials or hearings.

If the standards proposed by the United States (or similar principles) are adopted, the time-consuming taking and presentation of the mass of testimony and materials proffered by California will be avoided as irrelevant and the Court can readily adjudicate the individual segments for itself, on the basis of a manageable presentation of legal and some historical materials.[19] The present phase of the litigation, which began with the Government's Petition for a Supplemental Decree in January 1948, will then be brought to a close. If, however, California's general criteria are accepted, the Court may likewise end the entire present controversy by deciding at once that the State's claim to all the outer water areas (Report, 1951, pp. 38-41) is valid. In any case, the Court will then be in a position to determine whether the State's many-sided materials should be presented orally or in written form, and also whether or not they should be first submitted to a Master.

Under our proposed procedure, rules will be established for all the submerged lands cases, whatever the Court's judgment, and there will be authoritative guidance for future judicial proceedings, for agreements between the parties, and for legislative action. On the other hand, if the whole

[19] This is particularly true if, as we suggest, the Court limit the first hearing to the three oil-producing segments. See Point III, *infra*.

matter is now referred to a Master for the taking of testimony, years will elapse before any such guiding principles can be adjudged by the Court, and in the end it may very well turn out, as we believe, that the accumulated testimony is irrelevant and the delay unnecessary. Orderly management of the litigation requires, in our view, that the Court now decide the legal issues on the basis of materials normally marshalled and presented to courts in briefs and arguments on legal questions.

III

The Existence of Historic Exceptions to the Application of the Underlying Principles for Determining the Limits of Inland Waters in the Three Oil-Producing Segments Should Now Be Heard and Determined by the Court on Briefs and Oral Argument

Although there is a large area of disagreement between the United States and California as to the appropriate general criteria to be applied in fixing the seaward limit of inland waters, there is apparent agreement that one of the factors which must be considered is whether historically the waters have been claimed as inland. The United States states this proposition in terms of "exceptions" to the application of the criteria it urges, and contends that the burden is on California to establish the existence of such historical situations (Report, 1951, pp. 5-6). California, on the other hand, considers that the historical claim is one of

the primary criteria to be applied (Report, 1951, p. 7). But, aside from this difference in approach, there is agreement that the status of an area cannot be finally adjudicated until a determination is made of whether the waters have been historically considered to be inland waters. The United States urges that the Court set this matter down for determination on briefs and oral argument with respect to the three oil-producing areas, to be determined at the same time as the issues with respect to the underlying legal principles (Point II, *supra*).

A. It is the position of the United States that the determination of historical exceptions to the application of the general legal criteria will not require the introduction of oral testimony. It is believed that the historical facts relevant to the determination of this issue should be presented by making reference to documents and authoritative histories which may be judicially noticed by the Court.[20] This method of establishing historical

[20] For example, in determining whether an historical exception exists with respect to the San Pedro area, much of the necessary information relative to its history and development is to be found in rivers and harbors investigations and reports published as Congressional documents. See, for example, H. Ex. Doc. 191, 50th Cong., 1st sess.; H. Ex. Doc. 39, 52d Cong., 1st sess.; H. Ex. Doc. 41, 52d Cong., 2d sess.; S. Doc. 18, 55th Cong., 1st sess.; H. Doc. 969, 60th Cong., 1st sess.; H. Doc. 267, 62d Cong., 2d sess.; H. Doc. 896, 63d Cong., 2d sess.; H. Doc. 1013, 66th Cong., 3d sess.; H. Doc. 349, 68th Cong., 1st sess.; S. Doc. 130, 71st Cong., 2d sess.; H. Doc. 843, 76th Cong., 3d sess. See also *The Ports of Los Angeles and Long Beach, California* (War Department, Corps of Engineers, and U. S. Maritime Commission, Port Series No. 28, 1947).

facts by judicial notice rather than by the introduction of evidence is the accepted procedure. 9 Wigmore, *Evidence,* (3rd ed. 1940), sec. 2580; *The Antelope,* 10 Wheat. 66, 130; *Hoyt* v. *Russell,* 117 U. S. 401, 405; *Coffee* v. *Groover,* 123 U.S. 1, 11 *et seq.; Clark* v. *United States,* 99 U. S. 493, 495; *Ohio Bell Tel. Co.* v. *Commission,* 301 U. S. 292, 301-302; *De Celis* v. *United States,* 13 C. Cls. 117, 126; *Cuyler* v. *Ferrill,* 1 Abb. (U. S.) 169, 178-179, Fed. Case No. 3523, 6 Fed. Cas. 1088, 1091 (C. C. S. D. Ga.). Indeed, courts in California have made determinations of the historical status of bays (although, we believe, erroneous ones) on the basis of such materials. *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 Pac. 722; *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941 (gambling ship case). See also *United States* v. *Carrillo,* 13 F. Supp. 121 (S.D. Cal.) (also a gambling ship case).[21]

It appears from the representations made to the Special Master by California that California desires to present the historical data pertinent to these issues through the introduction of oral testimony (Report, 1951, pp. 14-17). However, an examina-

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[21] In this case, the court observed: "There is much authority to the effect that the territorial jurisdictional question lies wholly with the court, and is not the subject of evidence, as upon an issue in the trial, and I so hold. See *Coffee* v. *Groover,* 123 U. S. 1, 8 S. Ct. 1, 31 L. Ed. 51, relating to the subject of judicial knowledge in determining the boundary line between the states of Georgia and Florida. * * *." *United States* v. *Carrillo,* 13 F. Supp. 121, 122.

tion of the scope of this proposed testimony makes it clear that it would establish no facts, events, or developments which cannot be made available to the Court by means of citation to, or quotations from, recognized treatises, such as the exhaustive Bancroft's *History of California* and the many other works listed by California in the materials submitted to the Special Master. (See California's *Citation of Documents,* pp. 327-330.) [22]

It is therefore the position of the United States that the determination of the historical exceptions to the application of the general legal principles is ripe for consideration by this Court, at the present time, on the basis of briefs and oral argument. No purpose except delay can be served by postponing the determination pending the introduction of such testimony as is proposed by California.

B. In order to expedite the proceedings it is also urged that the Court limit this phase of the case at the present time to a consideration of the claimed historic exceptions for the three areas listed by the Special Master in Group 1 of the three coastal segments requiring determination (Report, 1949, pp. 1 and 2) [23] This will reduce the immediate

[22] The Special Master appears to lean to the view that oral testimony of the nature suggested by California is unnecessary (Report, 1951, pp. 16-17).

[23] The Special Master's 1949 Report, recommending two groups of coastal segments for precise determination and adjudication, has not been adopted by the Court, being merely received and ordered filed. 337 U. S. 952. Moreover, we do

burden on the Court while at the same time expediting a final adjudication of the areas where the activities of California are claimed to be in conflict with the paramount powers of the United States.

As the Special Master has advised the Court (Report, 1951, pp. 2-3), the United States, throughout the proceedings leading up to both the 1949 Report and the 1951 Report, has asserted, and California has not denied, that the three coastal segments comprising Group 1, as listed in the 1949 Report, are the only segments of offshore land along the California coast from which petroleum is being taken.

The United States does not oppose the eventual determination of the boundary along any segment of the California coast where such determination may prove to be necessary.[24] Its position is simply that the three areas originally described in its Petition for the Entry of a Supplemental Decree, which are the only segments within which oil production is presently being conducted, are more urgently in need of early determination. It was the activity of the State of California and its les-

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not read either the Master's 1949 Report or his 1951 Report as recommending that all seven segments be adjudicated simultaneously or as precluding the prior adjudication of Group 1.

[24] As hereinbefore indicated, *supra*, pp. 12-14, 20, 35-36, the criteria established by the adjudication of the issues now before the Court may make any subsequent more exact determination unnecessary.

sees in connection with the extraction of petroleum from offshore submerged areas that made necessary the bringing of this litigation. The complaint alleged that California, through its lessees, was exploiting the area in violation of the rights of the United States. The answer of the State admitted such activity, asserting the claim of the State to ownership of the area and the resources situated therein, and it was largely on the basis of these conflicting allegations as to the right to develop petroleum deposits that the Court found a justiciable controversy presented in this proceeding. 332 U. S. 19, 24-25. Clearly, therefore, the petroleum issue has been at the forefront in this litigation from the beginning and we respectfully urge that those segments of the coast containing petroleum deposits are entitled to priority in the adjudication of the boundary.

There are persuasive considerations of a practical nature which make it imperative that the oil-producing segments be adjudicated at the earliest possible time. Because of California's claim that the so-called "channel" areas consist of inland waters, there is no offshore oil field along the California coast that is not presently the subject of dispute as to status.[25] Consequently, until the

[25] It is understood, of course, that in adjudicating the three oil producing segments specified by the United States in its Petition for Entry of a Supplemental Decree, the Court will also have to pass upon the larger water areas, embracing and extending seaward of those three segments, which California claims as inland waters (Report, 1951, pp. 38-41).

boundary has been determined, at least in general terms, along the oil-producing segments, it is impossible to identify a single oil well as being subject to the control of either the United States or of the State. Meanwhile, since June 23, 1947, it has been necessary to impound in a special fund all revenues derived from offshore operations along the coast of California, and neither the United States nor the State has been able to utilize its share of those revenues. The fiscal problem created by the long delay in the ascertainment of the boundary in the areas from which oil is being extracted should be remedied as quickly as possible.

A serious problem also exists in the Long Beach area, which is defined as Segment 1(b) in the Special Master's Report of May 31, 1949. The City of Long Beach has for some time engaged in the extraction of oil from submerged areas within its harbor, those areas having been granted to the City by an act of the California Legislature.[26] The oil pool in which these operations of the City are being conducted extends a considerable distance seaward of the line claimed by the United States as the seaward limit of San Pedro Bay, but no oil well heretofore drilled by the City is bottomed seaward of that line.[27] However, under recommended

[26] Act of May 1, 1911, Cal. Stats. 1911, p. 1304.

[27] In a letter dated July 11, 1951, the Secretary of the Interior has advised the Attorney General that the City of Long Beach plans to proceed with the drilling of more than 100

conservation and engineering practices, it is advisable that that portion of the Long Beach pool situated seaward of the line claimed by the United States should be developed at the earliest possible time in order that the most efficient recovery of petroleum from the field may be accomplished. It is understood that the City of Long Beach would promptly undertake the development of this outer portion of the field if it were established that the oil pool is situated under inland waters within its harbor. In like manner, the Secretary of the Interior would promptly proceed to develop this area, under his inherent authority to prevent drainage of oil deposits belonging to the United States, if he were assured that the area involved is a part of the marginal sea, outside of the inland waters of California. Because of these circumstances, there is a critical need for an early determination of the boundary line in the San Pedro Bay area.

Consideration at the present time of the four other areas of Group 2 will necessarily encumber and delay the adjudication of the oil-producing areas. If the initial hearing is limited to the

additional wells from a recently completed extension of Pier A in Long Beach Harbor, the seaward projection of which virtually coincides with a portion of the boundary line claimed by the United States in that area. See map opposite page 150, Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 20, 82nd Cong., 1st sess. The Secretary also advised that the operation of these proposed new wells, even if all of them should be bottomed landward of the line claimed by the United States, would seriously increase the drainage of oil from that portion of the pool situated seaward of that line.

Group 1 segments, only one area—San Pedro Bay— will properly be the subject of a substantial dispute over historical status.[28] If all seven segments are set down for hearing, the Court will be faced with adjudicating five separate historical claims simultaneously, since California also claims the four areas of Group 2 on historical grounds. And, certainly, acceptance of the State's general criteria for determining the boundary, bringing in its train a mass of particularized materials of all sorts, would indefinitely delay determination of the oil areas while the Court or some preliminary tribunal, such as a Master, is considering the detailed materials respecting the four additional segments.

On the other hand, aside from the fact that the determination of appropriate criteria may make any more definite location of the boundary unnecessary in many areas, the adjudication of the three oil-producing segments may, through the results obtained from the application of controlling criteria, provide a basis for the elimination of much of the remaining controversy between the parties. The parties have already agreed, through their counsel, that such areas as San Francisco Bay, San Diego Bay, and a described area at San Pedro, ought to be regarded as inland waters. It is probable that, following the adjudication of the

[28] The State also claims that Santa Barbara Channel is an historical inland water, but we do not regard this claim as substantial.

three oil-bearing areas, the parties may be so advised as to the governing principles as to be able to enter into further agreements eliminating many, if not all, of the other segments of the California coast as to which there may be a dispute. For instance, establishment, through the adjudication of the San Pedro area, of the principles for determining historical bays might lead to settlement of controversies over other areas, including those (or some of those) in Group 2.

The circumstances justify, we believe, an adjudication of the status of the three segments listed by the Special Master as Group 1—together with the large outer water areas embracing those segments—prior to the consideration of any other segments which may require adjudication.

IV

No Survey Along the Ground Is Necessary or Desirable at This Time

In both of his reports (Report, 1949, p. 3; Report, 1951, p. 3), the Special Master has stated that the three issues defined by him must be determined by "judgment of the Court" before any survey of any portion of the boundary may be undertaken. The Special Master also observed, however, that an adjudication of the appropriate criteria for ascertaining the boundary "may make any subsequent more exact determination unnecessary." (Report, 1949, p. 3). The United States endorses

this suggestion of the Special Master and commends it to the consideration of the Court.

Because of circumstances inherent in all water boundary problems, it is quite probable that an actual survey of the boundary will never be required along most of the coast of California embraced in the segments under consideration. As is clear from the questions now to be decided, the boundary, when ultimately determined by the Court, will be either (1) a straight line marking the seaward limit of inland waters where such waters enter the ocean, or (2) the ordinary low-water mark of the ocean along the open coast.

Where the boundary is a straight line marking the seaward limit of inland waters, a decree by this Court designating the headlands between which that straight line is to be drawn would, in all probability, be sufficient to advise all persons concerned as to the location of the boundary, without the necessity of any more precise location. Where the boundary follows the ordinary low-water mark, a decree describing the boundary as "the ordinary low-water mark of the Pacific Ocean" between selected points will in most instances be sufficient. This is true because the ordinary low-water mark is not "a physical mark made upon the ground by the waters", but is the line of ordinary low-water "as determined by the course of the tides" (cf. *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 22), and because a boundary line along the water's edge is a continuously changing

line, affected by the natural processes of accretion and erosion. *Supra,* pp. 33-34. Consequently, a survey of the line made in 1951 would not necessarily represent the boundary in 1955 or 1960. For this reason, it is our view that, once appropriate criteria have been provided by the Court, an actual survey of the boundary will be required only at particular places and for limited distances where, at some particular time, it is necessary to ascertain the status of some tract or strucure, such as an oil well, as determined by its location in relation to the boundary. Cf. *Oklahoma* v. *Texas,* 265 U. S. 500, 502. It is probable that no actual survey will be necessary in the case of the great majority of oil wells and structures which lie sufficiently distant from the boundary, on one side or the other, so that a precise survey along the ground would be superfluous.

The adequacy of a general adjudication of governing criteria is, we think, revealed in the decree entered by this Court in other boundary proceedings. Thus, in *Oklahoma* v. *Texas, supra,* the parties themselves agreed that the boundary should not be run and marked upon the ground along the full length of the river, but only at certain specified places, and the Court permitted the parties to withdraw their earlier prayers for a full survey. 261 U. S. 340, 343. Furthermore, with respect to those segments of the river bank along which the boundary was surveyed, the final decrees approv-

ing such surveys contained the provision "subject however to such changes as may hereafter be wrought by the natural and gradual processes known as erosion and accretion." 265 U. S. 500, 505; 267 U. S. 452, 454-455; 269 U. S. 314, 315; 274 U. S. 714.

Another instance of a boundary adjudication in which the boundary, even where surveyed, was subject to subsequent change, was *New Jersey* v. *Delaware,* 291 U. S. 361; see Decree, par. 5, 295 U. S. 694, 698. A portion of the boundary involved in that litigation was adjudged to be the "mean low water mark on the easterly or New Jersey side of the Delaware River."[29] 295 U. S. 694. It is of great significance, we think, that the description of the boundary set forth in this decree, in the portion thereof where the boundary consisted of mean low water mark, was expressed in general terms only, a typical excerpt therefrom reading as follows (295 U. S. at 696):

> Thence (2) along the mean low water line of the eastern bank of the Delaware River the several courses and distances thereof, the general direction being southwestward, crossing in a straight line the mouth of each intervening small estuary, to a point on the end of the spit extending southwestward from the

[29] The Delaware River, along the portion thereof where the boundary was described as the "mean low water mark", is a tidal river, affected by action of the tides of the Atlantic Ocean. *U. S. Coast Pilot, Atlantic Coast,* Section C (Sandy Hook to Cape Henry), 5th (1947) ed., 107.

> fast land of Oldman's Neck, on the northwestern side of the mouth of Oldman's Creek * * *.

It is respectfully suggested that the Court may desire to enter in this case a decree similar to that entered in *New Jersey* v. *Delaware,* such as the decree proposed in the United States' petition of January 1948 (with some amendments expanding and defining the term "ordinary low-water mark"). A decree of that type is phrased, it is believed, in such terms as to make an actual survey necessary only in limited instances[30] and, at the same time, provides the criteria by which engineers may be guided in making such a survey, now or at any time in the future. Moreover, it is also believed, as explained in Point II above, that such a general decree could be entered on the basis of the standards and criteria to be established by the decision of the three questions defined by the Special Master. Consequently, the early decision of these questions by the Court itself, in the manner urged by the United States, would greatly expedite these proceedings and constitute a long step toward the final disposition of this litigation without burdening the Court with engineering problems.

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[30] The survey made in *New Jersey* v. *Delaware,* where the boundary follows the eastern bank of the river, appears to have consisted chiefly of a location of the points between which the boundary consists of the mean low water mark and those points between which straight lines are drawn across tributary rivers, creeks, and other indentations. 295 U. S. 694, 695-697.

CONCLUSION

The main opinion in this case was handed down on June 23, 1947, 332 U. S. 19, and the general decree was entered on October 27, 1947. 332 U. S. 805. The Government's Petition for Entry of a Supplemental Decree was filed on January 29, 1948, and the three-and-one-half years since that time have been taken up with consideration of the proper procedure for selection and adjudication of specific areas off the California coast. This lapse of time, together with the Court's desire for a simplification of the issues, suggests that a procedure be adopted which has the best chance of leading to a speedy determination of the controlling issues and a quick end to this phase of the litigation. In our view, the procedure we advocate is best geared to attain those results. The three underlying legal issues must be decided before any further steps may be taken in this litigation. The historical materials requisite to a decision of whether there exist exceptions to the general criteria for determining the boundary are within the scope of judicial notice. The decision of these underlying legal issues will undoubtedly provide controlling criteria which may, in large part, eliminate the necessity for later adjudications. The Court should, therefore, set these issues for hearing on the briefs and oral arguments of the parties, without any prior hearings or oral testimony. At this stage, hearings before a Master or other preliminary tribunal would merely delay and postpone

determination of the important legal issues for some more years, without any compensating advantages to the Court, the parties, or the public.

Because of their importance to both parties and their relation to the circumstances which made necessary the institution of this litigation, the three oil-producing segments of the California coast (and the large water areas including those segments) should be given precedence over any other segments requiring adjudication.

Respectfully submitted.

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